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92-613

No. _____

Supreme Court, U.S.
FILED
OCT 7 1992
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In The

Supreme Court of the United States

October Term, 1992

THE HARRY AND JEANETTE WEINBERG FOUNDATION INCORPORATED, a Maryland corporation,

Petitioner,

v.

CROYDEN ASSOCIATES; and SERVICE AMERICA CORPORATION, a Delaware corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT ARTHUR BRUNIG
O'CONNOR & HANNAN
3800 IDS Tower
80 South Eighth Street
Minneapolis, Minnesota 55402
Telephone: (612) 343-1200

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether a member of a conditionally certified class who enters a timely appearance in response to a district court's first notice and who objects to certification of and participation in a non-opt-out class, to the adequacy of the class representative and to the terms of a proposed settlement, but who does not move to intervene, lacks "standing" to appeal from a judgment certifying the class on a non-opt-out basis and approving the settlement.

Whether an appeal by an unnamed class member whose intervention in an action under 28 U.S.C. § 1332 is precluded by 28 U.S.C. § 1367(b) because the class member's intervention would have destroyed "complete diversity" may be dismissed for lack of "standing" because the class member did not move to intervene.

PARTIES BELOW

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit included Alleco Inc. in addition to the parties whose names appear in the caption.[1]

Service America Corporation is a wholly-owned subsidiary of Servam Corporation.

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[1] The Eighth Circuit stayed the proceedings as to Alleco Inc. because Alleco Inc. had "sought protection under Chapter 11 of the Bankruptcy Act." *Croyden Assoc. v. Alleco Inc.*, 969 F.2d 675, 677 (8th Cir. 1992). The proceedings there remain subject to the "automatic stay," and the Eighth Circuit has not filed an opinion or entered a judgment as to Alleco Inc.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner The Harry and Jeanette Weinberg Foundation Incorporated (hereinafter "the Foundation") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 13, 1992.

OPINIONS

The judgment and opinion of the Eighth Circuit is reported at 969 F.2d 675 and is set forth in the Appendix. (Pet. App. 1-12). The order of the Eighth Circuit denying rehearing is reported at 969 F.2d 675 and is set forth in the Appendix. (Pet. App. 13).

The unreported final judgment and order of the United States District Court for the District of Minnesota (hereinafter "district court") is set forth in the Appendix. (Pet. App. 18-23). The unreported amended final judgment and order of dismissal of the district court is set forth in the Appendix. (Pet. App. 24-30).

JURISDICTION

The respondent Croyden Associates (hereinafter "Croyden Associates") invoked the jurisdiction of the district court under 28 U.S.C. § 1332(a)(1). (Pet. App. 14). The Foundation, as a member of a conditionally certified class, appeared, filed a written objection and made oral argument that certification of a class under Fed.R.Civ.P.23(b)(1) and (b)(2) was improper and that, in the alternative, Croyden Associates was not an adequate class representative and that the proposed settlement was not "fair, reasonable and adequate."[2] *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 676-77.

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[2] The Foundation also asserted other objections. *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d at 676-77.

On June 19, 1991, the district court entered judgment in which the district court certified a class (which included the Foundation) under Fed.R.Civ.P. 23(b)(1) and (b)(2), enjoined any class member (including the Foundation) from commencing or pursuing any other action and approved the settlement. (Pet. App. 19-21). On July 3, 1991, the district court amended its judgment without notice or a hearing. (Pet. App. 24-30). On July 9, 1991, the Foundation filed a notice of appeal as to both the judgment and the amended judgment.[3]

On July 13, 1992, the Eighth Circuit entered a judgment and filed an opinion in which the Eighth Circuit dismissed the Foundation's appeal for lack of "standing" to appeal. *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 680. A petition for rehearing with a suggestion for rehearing en banc was denied on August 24, 1992. *Id.* at 675.

This petition is being filed within ninety (90) days of the date of judgment.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1367. *Supplemental jurisdiction.*

(b) In any civil action of which the district courts have original jurisdiction founded solely

[3] Although the Eighth Circuit stated that the amended judgment was not at issue, *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 677 n.3, that statement conflicts with the explicit language of the Foundation's notice of appeal and the issues raised in the Eighth Circuit.

> on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

STATEMENT OF THE CASE

On September 1, 1985,[4] Alleco Inc. (hereinafter "Alleco") issued $105,000,000 of 9½% Convertible Senior Subordinated Debentures due 2010 (hereinafter "9½% Debentures"). *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 676. Alleco subsequently sold the stock of the respondent Service America Corporation (hereinafter "Service America") to SAC Acquiring Corporation, a wholly-owned subsidiary of Servam Corporation. Immediately thereafter, SAC Acquiring Corporation merged into Service America, and Service America survived as a wholly-owned subsidiary of Servam Corporation. Service America assumed Alleco's obligations under the 9½% Debentures. *Id.*

Alleco then sued the original indenture trustee seeking a declaratory judgment that Alleco had been released from liability to pay principal or interest on the 9½%

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[4] The Eighth Circuit incorrectly dates the offering as "August 1985." *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 676.

Debentures. The successor indenture trustee substituted itself as a defendant and counterclaimed for a declaratory judgment that Alleco remained obligated to pay. *Id.* at 677 n.2. The district court granted summary judgment declaring that Alleco had not been released from its obligation, concluding that Alleco's actions "constituted a repudiation of Alleco's obligations under the 9½% Debentures" and "gave rise to a default and permitting the successor trustee to give notice of default" and to declare principal and interest immediately due and payable.

Alleco and Service America appealed. Neither Alleco nor Service America made interest payments due to the 9½% Debentureholders on September 1, 1990, or thereafter. The appeal was then stayed by agreement.

An "informal committee"[5] of 9½% Debentureholders then began to meet.[6] *Id.* at 677. The "informal committee" negotiated with Service America, with General Electric Capital Corporation, Service America's senior lender, and with Alleco. On March 20, 1991, the "informal committee" and Alleco and Service America ultimately reached an "agreement in principle" to settle all claims against

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[5] The "informal committee" was called together by Service America; it was not formally elected or appointed. The "informal committee" included Croyden Associates, Fidelity Magellan Fund, Fidelity Growth & Income Portfolio, Salomon Brothers Inc., Salomon Partners Ltd., Steven Mizel IRA, Mutual Series Fund Inc., Mabon Securities, Inc., Angelo, Gordon & Co., L.P., Guardian Park Ave. Fund, Guardian Stock Fund Inc. and The Guardian Life Employees Incentive Savings Plan.

[6] Goldman, Sachs & Co., the general partner of Water Street Corporate Recovery Fund I, L.P., followed the progress of the "informal committee."

Alleco and Service America. *Id.* The "agreement in principle" contemplated that its terms would be "effectuated by a court-approved class action settlement" and was contingent "on approval by the [district c]ourt of the proposed settlement and the certification of a non-opt-out class." *Id.*

On May 14, 1991, Croyden Associates, a member of the "informal committee" acting in accord with the "agreement in principle," invoked the district court's jurisdiction under 28 U.S.C. § 1332(a)(1), (Pet. App. 14), and commenced an action against Alleco and Service America. *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 676. Croyden Associates immediately moved for the entry of judgment "certifying th[e] action as a class action" and "[d]eclaring that the terms of the proposed settlement [we]re fair, reasonable and adequate," *id.* at 676-77, and Alleco and Service America immediately stipulated to the relief sought by Croyden Associates.

On May 21, 1991, the district court scheduled a June 14, 1991 hearing and directed both published and mailed[7] notice to the beneficial owners of the 9½ Debentures. *Id.* at 677. On May 24, 1991, members of the "informal committee,"[8] Alleco and Service America reduced the "agreement in principle" to writing. *Id.* The Foundation[9] appeared in the action, filed a written objection, attended

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[7] The mailed notice was not distributed to the beneficial owners of the 9½% Debentures prior to the June 14, 1991 hearing.

[8] Goldman, Sachs & Co., joined with the "informal committee," approved the "agreement in principle" and executed the Settlement Agreement.

[9] The Foundation beneficially owns $13,292,000 of 9½% Debentures.

the June 14, 1991 hearing and orally objected. *Id.* The Foundation's principal objection was that the certification of a class on a non-opt-out basis was improper.[10] (Pet. App. 18-19).

On June 19, 1991, the district court entered judgment certifying the class on a "non-opt-out" basis and approved the Settlement Agreement. *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 677. On July 3, 1991, Service America moved to amend the judgment so as to release General Electric Capital Corporation from all claims. *Id.* at n.3. Although Croyden Associates had assured the district court that General Electric Capital Corporation was not being released, the district court amended the judgment immediately – before giving notice and without a hearing. (Pet. App. 26).

The Foundation appealed. *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 676. On July 13, 1991, the Eighth Circuit stated:

> We dismiss the . . . Foundation's appeal against Croyden Associates and Service America for lack of standing . . . .

Id. at 680. The basis of the Eighth Circuit's dismissal was that the Foundation had not moved to intervene in the district court and that a motion to intervene was a prerequisite for "standing" to appeal. *Id.* at 677-80.

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[10] In the alternative, the Foundation argued that Croyden Associates was not an adequate class representative and that the terms of the settlement were not "fair, reasonable and adequate" and made other objections. *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 677.

REASONS FOR ISSUING THE WRIT

I. The Eighth Circuit's Decision Is In Conflict With Decisions Of Other Courts Of Appeal.

The Eighth Circuit dismissed the Foundation's "appeal against Croyden Associates and Service America for lack of standing." *Id.* at 680. The Eighth Circuit did so because it now requires "intervention as a condition of appeal" by a class member who is not a named party and who objects "to a class settlement, with respect to the settlement itself and adequacy of class representation." *Id.* The Eighth Circuit explains that "unnamed class members who object . . . must move to intervene" and holds that "they will be denied standing to appeal when they have not done so. *Id.* at 679. That decision is in direct conflict with the decisions of certain Courts of Appeals; it also appears to conflict in principle with the decisions of yet other Courts of Appeals.

In holding that a class member who is not a named plaintiff must move to intervene in order to establish "standing" to appeal, the Eighth Circuit concedes a conflict with the holding of *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059, 1060 (7th Cir. 1970) ("[i]f a class member intervenes or even appears in response to a notice pursuant to Fed.R.Civ.P. 23(e) and objects to the dismissal or compromise, he has a right to appeal from an adverse final judgment"). The Eighth Circuit attempts to distinguish its holding by referring to a footnote in *Research Corp. v. Asgrow Seed Co.* in which the Seventh Circuit stated that "the failure of the appellants to formally intervene after receiving notice under Rule 23(e), before final

judgment forecloses their right to appeal." That distinction is, as the Eighth Circuit also concedes, of little substance because the Seventh Circuit subsequently "ignored th[e] footnote and . . . relied on the text." *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 679. The Eighth Circuit recognizes that the Seventh Circuit continues to adhere to its holding. *See, e.g., Armstrong v. Board of School Directors of City of Milwaukee*, 616 F.2d 305, 327 (7th Cir. 1980) ("unnamed class member who appears in response to a Rule 23(e) notice and objects to a settlement has a right to appeal from an adverse judgment" and "right to appeal exists independent of" motion to intervene in district court); *Patterson v. Stovall*, 528 F.2d 108, 109 n.1 (7th Cir. 1976) (objecting class member has standing to appeal from judgment approving settlement).

The Eighth Circuit also acknowledges that other Courts of Appeals permit a class member who is not a named plaintiff to appeal even though the class member had made no attempt to intervene. *See, e.g., Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 32 (3d Cir. 1971) ("aggrieved class members may appeal any final order of a district court in proceedings held pursuant to Rule 23. This general proposition holds true even though such class members have the right to exclude themselves from the class"); *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1309 (9th Cir. 1982), *aff'd sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983) (Rule 23 allows class member to appeal from order approving settlement to which class member objects); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (dissatisfied class member can challenge judgment approving a settlement by direct appeal); *Marshall v. Holiday Magic,*

Inc., 550 F.2d 1173, 1176 (9th Cir. 1977) (because they had standing to sue and their legal rights were affected by a settlement, unnamed class members could appeal from district court's approval of a settlement). The Eighth Circuit dismisses those holdings and explains that those Courts of Appeal had "not faced the issue of standing." *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 680. That explanation reads those holdings too narrowly and ignores the basic principle that an appellate court has an obligation to assume itself that it has jurisdiction of an appeal. *See, e.g., Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) ("appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review").

The Eighth Circuit's decision appears to conflict in principle with another line of cases. That line of cases – with roots in the majority of circuits – permits a person whose interests are represented by another (*e.g.*, a class representative, a fellow shareholder or a governmental agency) and who is affected by a judgment to appeal from an adverse judgment even if the person did not attempt to intervene. *See, e.g., Kenny v. Quigg*, 820 F.2d 665, 667-68 (4th Cir. 1987) (nonparty "who had an interest in the cause litigated [by the Secretary of Labor] and who participated in the proceeding actively enough to make him privy to the record may appeal despite the fact he was not named in the complaint and did not intervene"); *SEC v. Wencke*, 783 F.2d 829, 834 (9th Cir.), *cert. denied sub nom. deLusignan v. Gould*, 479 U.S. 818 (1986) ("persons who were not parties of record before the district court" may appeal if "(1) they participated in the district court proceedings and (2) the equities weigh in favor of hearing

the appeal"); *Martin-Trigona v. Shiff*, 702 F.2d 380, 385-86 (2d Cir. 1983) ("nonparty is allowed to appeal if the trial court's judgment has affected the nonparty's interest); *In re W.T. Grant Co.*, 699 F.2d 599, 607 (2d Cir.), *cert. denied sub nom. Cosoff v. Rodmen*, 464 U.S. 822 (1983) (" 'even where class members had the right to exclude themselves from the class, they may appeal from an order approving a settlement which they deem unsatisfactory' "); *In re Eastern Sugar Antitrust Litigation*, 697 F.2d 524, 527-28 (3d Cir. 1982) (person who was not a party to a class action, but who did participate extensively in settlement proceedings and who was affected by district court's order has standing to appeal); *Adams v. Morton*, 581 F.2d 1314, 1318 (9th Cir. 1978), *cert. denied sub nom. Gros Ventre Tribe v. United States*, 440 U.S. 958 (1979) (nonparty who participates in case and has interest in result may appeal); *SEC v. An-Car Oil Co.*, 604 F.2d 114, 119 (1st Cir. 1979) (debentureholders who were "not parties to the SEC suit," but who "participated in hearings," were afforded "standing" to appeal); *Gendron v. Shastina Properties, Inc.*, 578 F.2d 1313, 1315 (9th Cir. 1978) (class member who objects to settlement must file timely appeal from judgment); *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 602-03 (9th Cir. 1978) (because nonparty had participated in proceedings in district court and had legitimate interest in the outcome, nonparty had standing to appeal); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1180-81 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) ("dissenters to a class action settlement may . . . appeal the district court's approval" of the settlement); *Central S.C. Chapter, Soc'y of Professional Journalists v. United States Dist. Ct.*, 551 F.2d 559, 566 (4th Cir. 1977) (nonparty has "standing" to

appeal if he is aggrieved by final decision); *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 829 (3d Cir. 1973) (individuals who are within definition of class have "standing" to appeal from exclusion from class when they appeared and participated); *Sertic v. Cuyahoga, Lake, Geauga & Ashtabula Counties Carpenters Dist. Council*, 459 F.2d 579, 581 (6th Cir. 1972) (class members who "were not parties to the proceeding" because they did not receive notice and who did not have an opportunity to object had "standing to bring the appeal"); *Cohen v. Young*, 127 F.2d 721, 724 (6th Cir. 1972) (class member whose motion to intervene was denied and who did not appeal from that denial has "standing" to appeal and "is entitled as of right to prosecute the appeal"); *West v. Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 623-24 (2d Cir. 1934) (one whose interests are affected by judgment has standing and is "allowed to appeal"); *cf.* 3B J. Moore & J. Kennedy, MOORE'S FEDERAL PRACTICE ¶ 23.80[5] at 23-496 (2d ed. 1991) ("member of a class who appears in response to the court's notice . . . and objects to [a] compromise has a right to appeal from an adverse final judgment although he did not become a formal party of record"); 7B C. Wright, A. Miller & M. Kane, FEDERAL PRACTICE & PROCEDURE § 1802 at 463 (2d ed. 1986) ("any class member who has objected . . . has a right to appeal"); 9 J. Moore, B. Ward & J. Lucas, MOORE'S FEDERAL PRACTICE ¶ 203.06 at 323 (2d ed. 1987) ("a person who has an interest in the cause litigated and participated actively enough to make him privy to the record may appeal despite the fact that he was not named in the complaint and did not intervene").

The Eighth Circuit finds support for its holding only in *Guthrie v. Evans*, 815 F.2d 625, 627 (11th Cir. 1987) and in *Walker v. City of Mesquite*, 858 F.2d 1071, 1072-74 (5th Cir. 1988). The Eighth Circuit cites with approval the rationale of *Guthrie* and notes that *Guthrie*

> outlined three alternative avenues of relief for a class member who is unsatisfied with the class settlement. First, the objector may move to intervene as of right pursuant to Fed.R.Civ.P. 24(a)(2), . . . and the district court's denial of the motion to intervene of right is appealable. . . . Second, the objector may collaterally attack the settlement approval by filing a separate suit challenging the adequacy of the class representation. . . . Third, if the class is certified under Rule 23(b)(3), the individual class member may opt out. . . . With these legal avenues available, *Guthrie* concluded that there was no need to allow a class member to appeal a judgment satisfactory to the class representatives and presumably the majority of class members.

Croyden Assoc. v. Alleco Inc., 969 F.2d at 678. The Eighth Circuit acknowledges that the holding of *Guthrie* has been undercut by a subsequent decision of the Eleventh Circuit. *See In re Dennis Greenman Sec. Litigation*, 829 F.2d 1539, 1542 (11th Cir. 1987) (class member may preserve right to appeal from a judgment approving a settlement by objecting to the terms of the settlement). The Eighth Circuit itself vitiates *Guthrie's* rationale by holding that a class member who objects will not be permitted to collaterally attack a judgment approving a settlement of a class action by filing a separate action or to opt out if the district court certifies the class "under Fed.R.Civ.P.

23(b)(1) and (b)(2)." *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 680.

The Eighth Circuit adopted and twisted precedent from the Fifth and Eleventh Circuits. In doing so, it generated further confusion by eliminating the mitigating rationale of those Circuits. The conflict between the Eighth Circuit and the majority of Circuits merits plenary consideration.

II. The Eight Circuit's Decision So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power of Supervision.

The Eighth Circuit holds that, even though an unnamed class member appears in a timely fashion and objects to certification of the class on a non-opt-out basis, to the adequacy of the class representative and to the terms of a proposed settlement, the class member is to be denied "standing" to appeal. *Id.* at 677-80. That holding departs from the accepted and usual course of judicial proceedings.

First, the accepted and usual statement of the doctrine of "standing" to appeal may be set forth succinctly:

> Standing to appeal rests on two requirements. The appellant must be privy to the record and must be aggrieved by the order appealed from. Ordinarily, parties privy to the record means parties of record at the time the judgment was entered. . . .

9 J. Moore, B. Ward & J. Lucas, MOORE'S FEDERAL PRACTICE ¶ 203.06 at 3-21 (2d ed. 1992). Indeed, this Court echoes that statement:

> The rule that only parties to a lawsuit or those that property become parties, may appeal an adverse judgment, is well settled. *See, e.g., United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917); Fed. R. App. Proc. 3(c) ("The notice of appeal shall specify the party or parties taking the appeal").

Marino v. Ortiz, 484 U.S. 301, 304 (1988). The Eighth Circuit needed to go no further.

The Foundation satisfied the requirements for "standing" to appeal. The Foundation was and remains "an unnamed class member." *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 677. As an unnamed class member, the Foundation was and is "privy to the record" as a "party." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551 (1974) ("claimed members of the class st[an]d as parties to the suit until and unless they . . . cho[o]se not to continue"). The Foundation, as a class member and "party," was also bound by the judgment. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (judgment in class action binds all members of class). The Foundation was also "aggrieved by the order appealed from," *i.e.*, the district court's adverse judgment. *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 676-77. The Eighth Circuit disregards the Foundation's status as a "party" and insists that it and any other unnamed "party" move to intervene, *i.e.*, ask to become what it already is, if it wishes to appeal.

Second, accepted and usual policy to be followed in managing class actions militates against intervention by

unnamed class members. This Court explains that requiring immediate intervention by unnamed class members

> would frustrate the principal function of a class suit, because then the sole means by which members of the class could assume their participation in the judgment . . . would be to file . . . individual motions to joint or intervene as parties – precisely the multiplicity of activity which Rule 23 was designed to avoid. . . .

American Pipe & Constr. Co. v. Utah, 414 U.S. at 551. The Eighth Circuit gives no weight to that policy and would return courts and litigants to the days of the "spurious" class action. The Eighth Circuit should have guarded that legitimate function of a class action: avoidance of multiplicitous and unnecessary motions to intervene.

Third, accepted and usual procedure allows all who are bound by an injunction's restriction to appeal from the judgment. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 107-10 (1969) (nonparty who is enjoined may appeal); *Thompson v. Freeman*, 648 F.2d 1144, 1146-47 & n.5 (8th Cir. 1981); *Commercial Sec. Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1354 (10th Cir. 1972) (person who was not joined as a party and who did not intervene, but who is enjoined, may appeal); *United States v. American Soc'y of Composers*, 442 F.2d 601, 605 (2d Cir. 1971) (person who is "given no choice" and who is subjected to injunction has "standing to take . . . appeal"). Although the district court

> permanently enjoined [the Foundation and all other members of the class] from prosecuting, commencing or continuing any or all causes of action . . . against [Alleco, Service America and

> others] based in any manner upon the 9½% Debentures,

(Pet. App. 20-21, 26-27), the Eighth Circuit denies the Foundation "standing" to appeal. That fails to insure that all who are to be bound by an injunction and who may be subject to a district court's contempt power have an opportunity to obtain appellate review of the injunction.

Fourth, accepted and usual practice bars a litigant's appeal from an order which the litigant sought. The Eighth Circuit's decision would undermine that salutary practice.

The Foundation objected to certification of a class under Fed.R.Civ.P. 23(b)(1) and (b)(2), (Pet. App. 16-17, 30), and explicitly requested that the district court afford the Foundation the "right to pursue its rights separately." (Pet. App. 16). The Eighth Circuit nevertheless holds that the Foundation and other

> unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so.

Croyden Assoc. v. Alleco Inc., 969 F.2d at 679. The Eighth Circuit makes no attempt to explain why a class member who seeks to opt out should be required to move to intervene before seeking to opt out.

Fed.R.Civ.P. 24(c) requires an intervenor to

> serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim . . . for which intervention is sought.

The Eighth Circuit would force an unnamed class member to serve a proposed complaint even though the class member's only purpose is to seek to opt out, *i.e.*, avoiding the assertion of a claim in that proceeding.

District courts undoubtedly will be frustrated by the Eighth Circuit's required sequence: motions to intervene followed by requests to opt out. If a district court denies a request to opt out, it would be difficult to fault an appellate court's affirmance.

Finally, the accepted and usual course of proceedings suggests that traditional methods of practice not be abandoned abruptly and without compelling reason. The Eighth Circuit had always permitted an unnamed class member to appeal. *See, e.g., In re Federal Skywalk Cases*, 680 F.2d 1175, 1177 (8th Cir.), *cert. denied sub nom. Stover v. Rau*, 459 U.S. 988 (1982); *Reynolds v. National Football League*, 584 F.2d 280, 281 (8th Cir. 1978); *Grunin v. International House of Pancakes*, 513 F.2d 114, 120 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). There was no reason not to endorse that traditional practice.

The issue raised is an important one. There should be uniformity in the procedure to be followed by an unnamed class member who wishes to preserve an opportunity for appellate review. There should also be economy in allocating the scarce judicial resources required to manage class actions. This Court's review can accomplish both those ends.

III. The Eighth Circuit Decided A Question Concerning The Federal Courts' "Supplemental Jurisdiction" Which Ought To Be Settled By This Court.

The issue of "pendent" and "ancillary" jurisdiction is one which has long troubled the courts. *See, e.g., Finley v. United States,* 490 U.S. 545, 555 (1989) (rejecting jurisdiction over "pendent party"); *Aldinger v. Howard,* 427 U.S. 1, 13 (1976) ("little profit in attempting to decide . . . whether there are any principled differences between pendent and ancillary jurisdiction"); *Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365, 374 (1978) (district court cannot defeat "statutory requirement of complete diversity" by asserting ancillary jurisdiction over claims against nondiverse defendants who are subsequently impleaded); *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966) (recognizing jurisdiction over "pendent claim"); *Moore v. New York Cotton Exchange,* 270 U.S. 593, 610 (1926) (recognizing ancillary jurisdiction over mandatory counterclaim). Congress set out to clarify and codify that area of the law. 28 U.S.C. § 1367(b) now provides:

> In any civil action of which the district courts have a original jurisdiction founded solely on [28 U.S.C. §] 1332 . . . the district court shall not have supplemental jurisdiction under subsection (a) . . . over claims by persons . . . seeking to intervene as plaintiffs under Rule 24 of [the Federal Rules of Civil Procedure,] rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of [28 U.S.C. §] 1332.

Application of that subsection precluded intervention by the Foundation. D. Siegel, *Practice Commentary: The 1990*

Adoption of § 1367, 28 U.S.C.A. § 1367 at 234 (Supp. 1992) ("second reference to Rule 24 in subdivision (b) of § 1367 makes it explicit that one seeking to intervene as a plaintiff under Rule 24 is not to be given supplemental jurisdiction of the claim the intervenor proposes to plead").

Croyden Associates commenced its action against Alleco and Service America by invoking the district court's subject matter jurisdiction based solely on 28 U.S.C. § 1332(a)(1). Croyden Associates premised diversity jurisdiction upon the following: (1) Croyden Associates was a Florida partnership whose partners reside in the State of Florida, (2) Alleco was a Maryland corporation with its principal place of business in the State of Maryland, (3) Service America was a Delaware corporation and has its principal place of business in the State of Connecticut and (4) the amount in controversy exceeded $50,000. (Pet. App. 14). The district exercised "original jurisdiction founded solely on [28 U.S.C. §] 1332." (Pet. App. 14, 18, 24).

Because the district court exercised "original jurisdiction founded solely on [28 U.S.C. §] 1332," the district court could not exercise "supplemental jurisdiction under [28 U.S.C. § 1367(a)] over claims by persons . . . seeking to intervene as plaintiffs under Rule 24" if "exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of [28 U.S.C. §] 1332." If the Foundation had sought "to intervene as [a] plaintiff under Rule 24," the district court's exercise of "jurisdiction over such claims would [have been inconsistent with the jurisdictional requirements of [28 U.S.C. §] 1332" because the Foundation, as a proposed plaintiff-intervenor, was and is a Maryland corporation with its

principal place of business in the State of Maryland, (Pet. App. 15), Alleco, one of the defendants, was also a Maryland corporation with its principal place of business in the State of Maryland, (Pet. App. 14), and there therefore would no longer have been complete diversity of citizenship.

The Eighth Circuit makes no mention of 28 U.S.C. § 1367(b) and apparently assumes that there would have been no bar to the Foundation's intervention. The Eighth Circuit dismissed the Foundation's appeal for lack of "standing" on the ground that the Foundation had not sought to intervene and explained: "We believe it is particularly appropriate to require intervention as a condition for appeal." *Croyden Assoc. v. Alleco Inc.*, 969 F.2d at 680. The Eighth Circuit did not analyze whether or not the Foundation was entitled to intervene. That was the genesis of its error.

The Eighth Circuit should have made its own determination as to whether there would have been subject matter jurisdiction over the Foundation's claims against Alleco and Service America. *See, e.g., Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); *Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 287 n.10 (1928). The record clearly set forth the "citizenship" of the Foundation, the "citizenship" of Alleco and the ensuing lack of complete diversity.

The Eighth Court requires the Foundation to seek what 28 U.S.C. § 1367(b) expressly prohibits. That requirement violates the principle that the "law does not require the doing of a futile act." *See Ohio v. Roberts*, 448

U.S. 56, 74 (1980). That requirement also raises an important question – one which has not been, but should be, decided by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

ROBERT ARTHUR BRUNIG
O'CONNOR & HANNAN
3800 IDS Tower
80 South Eighth Street
Minneapolis, Minnesota 55402
Telephone: (612) 343-1200

Counsel of Record

October 6, 1992.

No. 91-2641
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CROYDEN ASSOCIATES, a Florida partnership, individually and on behalf of all those similarly situated,

Appellee,

and

THE HARRY AND JEANETTE WEINBERG FOUNDATION INCORPORATED,

Appellant,

v.

ALLECO INC. and SERVICE AMERICA CORPORATION,

Appellee.

JUDGMENT AND OPINION

JOHN R. GIBSON, Circuit Judge.

The Harry and Jeanette Weinberg Foundation appeal the district court's order[1] approving the settlement of a class action suit pursuant to Fed.R.Civ.P.23(e), in which the Foundation was an unnamed class member. The Weinberg Foundation objects to the settlement between the plaintiff class, represented by Croyden Associates, and Alleco Inc. and Service America Corporation, the

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[1] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

defendants. The Weinberg Foundation raises a number of arguments regarding justiciability, subject matter jurisdiction, Croyden Associates' standing to sue, a violation of the Trust Indenture Act of 1939, the adequacy of class representation, the certification of a non-opt-out class, adequacy of notice and the fairness, reasonableness and adequacy of the settlement. We need not address these arguments because we dismiss the Foundation's appeal for lack of standing.

Alleco issued $105 million in 9½% debentures to the public in August 1985. Through a series of transactions occurring in 1987 and 1988, Service America was to assume Alleco's obligations under the debentures. A controversy then arose as to whether the debentures had gone into default due to the transactions between Alleco and Service America. Prompted by Service America's deteriorating financial condition, a group of debentureholders, including Croyden Associates, organized a committee in July 1990 to negotiate a consensual restructuring of Alleco's and Service America's obligations to the debentureholders. After months of negotiations, the parties reached a tentative settlement on March 20, 1991. The agreement contemplated that its terms would be "effectuated by a court-approved class action settlement," and was contingent upon court approval of the settlement and certification of a non-opt-out class.

On May 14, 1991, Croyden Associates filed a complaint individually and on behalf of the putative class of debentureholders against Alleco and Service America, seeking the payment of principal and interest on the debentures as well as a declaration of the class's rights

regarding the acceleration and payment of the debentures. The complaint also outlined the terms of the proposed settlement between the parties and asked for a declaration that the settlement was fair, reasonable and adequate. Croyden Associates also moved for conditional class certification under Fed.R.Civ.P. 23(b)(1) and (b)(2) for settlement purposes and approval of the form of notice to be sent to class members regarding the proposed settlement.

The district court granted Croyden Associates' class certification motion, approved the proposed form of notice and scheduled a hearing for June 14, 1991, to consider the fairness of the proposed settlement to all class members. In the meantime, negotiations continued, leading to a formal settlement agreement on May 21, 1991, executed by Alleco, Service America and the holders of more than two-thirds of the aggregate principal amount outstanding on the debentures.

The Weinberg Foundation, an unnamed class member, submitted written objections to the fairness of the settlement, appeared at the June 14 hearing and made oral objections to the proposed settlement. The Weinberg Foundation made no attempt, however, to intervene in the action. No other class members objected to the proposed settlement.

The district court entered a final judgment on June 19, 1991, approving the settlement as "fair and adequate to the Class," and also granted related relief to the

parties.[2] *Croyden Associates v. Alleco Inc. & Service America Corp.*, No. 3-91-0323 (D. Minn. June 9 [sic], 1991).[3] The Weinberg Foundation then appealed.

While this appeal was pending, indeed, while the court was considering a draft of our opinion, Alleco's counsel notified us that it has sought protection under Chapter 11 of the Bankruptcy Act. Alleco is plainly entitled to a stay under 11 U.S.C.A. § 362(a)(1) (West Supp. 1992), and we sought response of the other parties as to the proper extent of that stay. The Weinberg Foundation argues that the stay should apply only to Alleco, and the case should proceed as to the other parties. Croyden Associates argues that the stay should apply to all proceedings. Service America takes no position as to whether Alleco is entitled to a stay, but argues that if the action is stayed as to Alleco, it should be stayed also as to Service America.

We are persuaded that the stay required by section 362 should extend only to claims against Alleco, and that the stay is not available to nonbankrupt codefendants, "even if they are in a similar legal or factual nexus with the debtor." *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1205 (3d Cir. 1992). *See also Fortier v. Dona Anna*

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[2] The settlement agreement also provided for the dismissal of a separate lawsuit Alleco had brought against the indenture trustee in November 1987 to determine whether its sale of assets to Service America had released it from its obligations on the debentures.

[3] On July 3, 1991, the district court made an amendment to its judgment that is not germane to this appeal.

Plaza Partners, 747 F.2d 1324, 1330 (10th Cir. 1984) (nothing in section 362 purports to extend automatic stay to claims against debtor's solvent codefendants). The only exception to this rule that any of the circuits recognize seems to relate only to nonbankrupt codefendants in " 'unusual circumstances.' " *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986). Decisions involving whether a stay is appropriate when a supersedeas bond has been filed or whether a party may move to dismiss an action commenced by a debtor do not reach the issue before us. We stay further proceedings in this appeal with respect to Alleco but decide the issues presented with respect to the remaining parties.

The Weinberg Foundation argues that its appearance at the fairness hearing and its filing of objections to the proposed settlement gives it standing to prosecute this appeal. The appellees contend that the Weinberg Foundation lacks standing to appeal the district court's approval of the consent decree because the Foundation failed to intervene in the action pursuant to Fed.R.Civ.P. 24. The appellees also make the telling point that the Foundation benefited from the settlement, which preserved the viability of the corporate entities, and then attempted to gain full recovery on the debentures not available to the rest of the class by bringing this appeal.

This court has not ruled on whether an unnamed class member has standing to appeal from an order approving a settlement agreement between the named parties of a class action suit. In *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975), a class member who opposed a court-

approved settlement agreement appealed the settlement without objection from the named parties. *Id.* at 120. *Grunin* is silent as to whether the objector was a named party, or whether he had intervened in the suit. Because of this ambiguity, and because no one raised the issue of standing on appeal, *Grunin* gives us no guidance for the issue we face. *See also Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978) (named parties did not raise standing issue when objector appealed from class action settlement).

The circuits are divided on this issue, and some have inconsistent holdings. The Eleventh Circuit has held that "a class member who is not a named plaintiff[] does not have standing to appeal the final judgment in [a] class action." *Guthrie v. Evans*, 815 F.2d 626, 627 (11th Cir. 1987). *Guthrie* gave three reasons for its holding:

> *First*, such individuals cannot represent the class absent the procedures provided for in Rule 23 of the Federal Rules of Civil Procedure. *Second*, class members who disagree with the course of a class action have available adequate procedures through which their individual interests can be protected. *Third*, class actions could be unmanageable and non-productive if each member could individually decide to appeal.

Id. at 628 (emphasis in original).

Guthrie expands upon the first reason above by explaining that the named plaintiffs cannot represent a class until the district court makes findings "that they will fairly and adequately protect the interests of the class." *Id.* Because there had been no such findings made regarding the non-named plaintiffs, the court held that

they "clearly ha[d] no standing to take action on behalf of the class." *Id.*

Guthrie outlined three alternative avenues of relief for a class member who is unsatisfied with the class settlement. First, the objector may move to intervene as of right pursuant to Fed.R.Civ.P. 24(a)(2), *id.*, and the district court's denial of the motion to intervene of right is appealable. *Id.* (citing *Sellers v. United States*, 709 F.2d 1469, 1471 (11th Cir. 1983)). Second, the objector may collaterally attack the settlement approval by filing a separate suit challenging the adequacy of the class representation. 815 F.2d at 628. Third, if the class is certified under Rule 23(b)(3), the individual may opt out. *Id.* With these legal avenues available, *Guthrie* concluded there was no need to allow a class member to appeal a judgment satisfactory to the class representatives and presumably the majority of class members. *Id.*

Finally, *Guthrie* looked to the rationale for class actions: namely, to render manageable litigation involving numerous class members who otherwise would all have access to the court through individual lawsuits. *Id.* at 629. If each class member could appeal individually, the litigation would become "unwieldy," and the purpose of class actions would be defeated. *Id. See also Shores v. Sklar*, 844 F.2d 1485, 1491 (11th Cir. 1988) (relying on *Guthrie*, court states that unnamed class member has no standing to appeal final judgment when named plaintiff does not appeal), *cert. denied*, 493 U.S. 1045 (1990) (subsequent history omitted). *But see In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1542 (11th Cir. 1987) (although court stated that class member may preserve appeal from class settlement by objecting to terms of settlement, none of the

parties raised issue of standing or the *Guthrie* decision, decided some six months earlier).[4]

The Fifth Circuit followed *Guthrie in Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988). The court held that unnamed members of a certified plaintiff class lacked standing to challenge a consent decree that the district court had ordered approving a settlement between the named parties. *Id.* at 1072. The court held that the objectors' alternative avenues of relief were to either move to intervene or to bring a separate suit in district court challenging the adequacy of the class representation. *Id.* at 1073-74. *See also Baylor v. United States Dep't of Housing & Urban Dev.*, 913 F.2d 223, 225 (5th Cir. 1990); *But see Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 504 (5th Cir. 1981) (unnamed class member who objected to settlement appealed consent decree without opposition on basis of standing), *rev'd on other grounds*, 716 F.2d 319 (5th Cir. 1983).

Guthrie found support for its holding in *Marino v. Ortiz*, 484 U.S. 301 (1988), in which a consent decree approving the settlement of a Title VII lawsuit was challenged by individuals who were not parties to the underlying litigation. The certified class represented Hispanic police officers who claimed that a civil service examination they were required to take caused a disparate impact in promotion decisions. *Hispanic Soc'y v. New York City Police Dep't*, 806 F.2d 1147, 1151 (2d Cir. 1986). A group of police officers appealed the settlement eventually reached

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[4] Interestingly, Judge Hill of the Eleventh Circuit sat on both the *Guthrie* and *Greenman* cases.

between the class and the city. The Supreme Court affirmed the dismissal of the appeal, stating:

> [W]e hold that because petitioners were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal from the consent decree approving that lawsuit's settlement. . . . We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable.

Marino, 484 U.S. at 304.

The Supreme Court was referring to officers who had filed objections to the settlement, and whose counsel was allowed to speak at the hearing and argue against the proposed settlement. *See Hispanic Soc'y*, 806 F.2d at 1152, 1153. While they were not unnamed class members, they were in a position similar to the Weinberg Foundation in that they were objecting to the approval of a settlement of the class action. We agree with *Guthrie* that *Marino* provides substantial support for holding that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so.

The Seventh Circuit has followed a different path. In *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970), the court stated that "[i]f a class member intervenes or even appears in response to a notice pursuant to Fed.R.Civ.P. 23(e) and objects to the dismissal or compromise, he has a right to appeal from an adverse final judgment." *Id.* at 1060 (citations omitted). The court cautioned in a footnote, however, that "the failure of the appellants to formally intervene after receiving notice

under Rule 23(e), before final judgment forecloses their right to appeal." *Id.* at 1060 n.2. Later cases have ignored this footnote and have relied on the text of *Research Corp.* to perpetuate the rule that an unnamed class member-objector may appeal from a class action judgment. *See, e.g., Armstrong v. Board of Sch. Directors,* 616 F.2d 305, 327 (7th Cir. 1980) (quoting text of *Research Corp.*); *Patterson v. Stovall,* 528 F.2d 108, 109 n.1 (7th Cir. 1976) (objecting class members have standing to appeal settlement agreement).[5]

Several circuits have allowed an appeal from a class action judgment without intervention, but they have not faced the issue of standing. In *Ace Heating & Plumbing Co. v. Crane Co.,* 453 F.2d 30 (3d Cir. 1971), the court stated, "Ordinarily, aggrieved class members may appeal any final order of a district court in proceedings held pursuant to Rule 23. This general proposition holds true even though such class members have the right to exclude themselves from the class." *Id.* at 32. In *Marshall v. Holiday Magic, Inc.,* 550 F.2d 1173 (9th Cir. 1977), appellants were

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[5] A more recent Seventh Circuit case, *Bash v. Firstmark Standard Life Insurance Co.,* 861 F.2d 159 (7th Cir. 1988), considered the appeal of three unnamed class members who objected to and appealed from a settlement. *Id.* at 160. Their attorney had also represented the settling plaintiff class and negotiated the court-approved settlement. *Id.* The thrust of the appeal is directed to counsel's action, and standing does not seem to have been raised. On petition for rehearing, however, the court cited *Guthrie, Shores* and *Walker,* and made clear that the parties had not brought these cases to the court's attention. *Id.* at 164. Because the principle of these cases had no practical consequences on the court's decision, the court made no further comment on standing. *Id.*

unnamed class members who appealed from the court's approval of the class action settlement. *Id.* at 1176. The Ninth Circuit stated that the appellants had legal rights affected by the settlement and had standing to sue. *Id.*[6] *See also In re Cement Antitrust Litig.*, 688 F.2d 1297, 1309 (9th Cir. 1982) (court states in dicta that Rule 23 allows class member to appeal from order approving settlement to which member objects), *aff'd sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (citing *Research Corp.*, court states that dissatisfied class member could have challenged settlement by direct appeal).

We have set out in some detail the reasoning articulated in *Guthrie*. We believe that *Guthrie* and *Walker* are persuasive authority and we see no decision that has pointed to a flaw in their analysis. Indeed, most of the cases advocating a contrary rule were decided before *Guthrie* and *Walker*. We believe it is particularly appropriate to require intervention as a condition for appeal when a class member's challenge to the adequacy of a settlement is contrary to the view of all the other class members. This is such a case. We also believe that by requiring intervention as a condition of an appeal, the effect is to channel into one line of litigation all issues of the class action settlement. This will avoid the bifurcation that would result from dismissal of the appeal on a standing

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[6] The appellees had argued that the appellants lacked standing, not because the appellants failed to intervene in the suit, but because they were not members of the plaintiff class. *Marshall*, 550 F.2d at 1176.

basis, followed by an independent action by the challenging class member.

We realize that the Weinberg Foundation could not have opted out of the class under Fed R.Civ.P. 23(b)(1) and (b)(2). We also recognize that both *Guthrie* and *Walker* refer to the right of individual nonnamed class members to file a separate suit challenging the adequacy of class representation. *Walker,* 858 F.2d at 1074-75; *Guthrie,* 815 F.2d at 628. In arguing the appeal before us, the parties seem to assume that other avenues of collateral attack were open. We express the thought that intervention to allow assertion of all objections to a class settlement, with respect to the settlement itself and adequacy of class representation, represents a preferable method of resolving such differences. We need not consider whether intervention is necessary to assert a claim of inadequacy of class representation, and we will leave consideration of this question for another day.

We dismiss the Weinberg Foundation's appeal against Croyden Associates and Service America for lack of standing and stay further proceedings in this appeal with respect to Alleco.

No. 91-2641
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CROYDEN ASSOCIATES, a Florida partnership, individually and on behalf of all those similarly situated, Appellee,
and
THE HARRY AND JEANETTE WEINBERG FOUNDATION, INCORPORATED, a Maryland corporation, Appellant,
v.
ALLECO INC. and SERVICE AMERICA CORPORATION, Appellee.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appellant's petition for rehearing with suggestion for rehearing en banc is denied as untimely.

August 24, 1992

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Civil No. 4-91-368

CROYDEN ASSOCIATES, individually and as representatives of a class of those similarly situated, Plaintiff,
v.
ALLECO INC. and SERVICE AMERICA CORPORATION, Defendants.

CLASS ACTION COMPLAINT

Plaintiff Croyden Associates ("Plaintiff"), individually and as representative of a class of those similarly situated, for its complaint against Alleco Inc. ("Alleco") and Service America Corporation ("Service America") states as follows:

* * *

2. Alleco, the successor to Allegheny Beverage Corporation, is a corporation organized and existing under the laws of the State of Maryland, with its principal place of business located at Allegheny Circle, Cheverly, Maryland 20781.

* * *

4. This Court has subject matter jurisdiction . . . pursuant to 28 U.S.C. § 1332 in that there is complete diversity. . . .

* * *

Dated: May 14, 1991.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Civil No. 4-91-368

AFFIDAVIT OF BERNARD SIEGEL

Filed June 7, 1991

[Title Omitted In Printing]

Bernard Siegel, being duly sworn, deposes and says:

* * *

2. I am the president of The Harry and Jeanette Weinberg Foundation Incorporated, a Maryland corporation (the "Foundation").

* * *

I SOLEMNLY SWEAR AND AFFIRM under the penalties of perjury that the contents of the foregoing are true and correct.

Dated: June 6, 1991.

/s/ Bernard Siegel

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Civil No. 3-91-323

EXCERPT FROM TRANSCRIPT OF
PROCEEDINGS ON JUNE 14, 1991

[Title Omitted In Printing]

(p. 26) MR. BRUNIG: I represent The Harry and Jeanette Weinberg Foundation Incorporated.

* * *

(p. 29) Now, I'd like to look for a moment at the terms of rules – of Rule 23(b), because if we assume that 23(a) has been satisfied, it is clear that this case is most appropriately one brought under 23(b)(3), not (b)(1) or (b)(2).

* * *

Now, the obvious reason that counsel seeks to compress this case into the strictures of (b)(1) and (b)(2) is that there is no opt-out under (b)(1) and (b)(2), and there would be an opt-out under (b)(3), the place where it is logically brought.

* * *

(p. 34) What we are saying is due process gives The Weinberg Foundation the right to pursue its right separately. We're not bound by an agreement reached by others even if they bought the same debentures. We

ought to be allowed to pursue those and have our day in Court . . . .

* * *

(p. 40) And at this point, at the very least, people should be given an opt-out option. Without an opt-out option, this becomes a kangaroo court, at best . . . .

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Civil No. 3-91-323

FINAL JUDGMENT AND ORDER OF DISMISSAL

Filed June 19, 1991

[Title Omitted In Printing]

This matter has come before the court to determine whether there is any cause why this court should not approve the proposed settlement (the "Settlement") set forth in the Settlement Agreement, dated as of May 24, 1991 (the "Settlement Agreement"), relating to the above-captioned action and the related action filed in this court captioned *Alleco Inc., et al. v. IBJ Schroder Bank & Trust Company* (Civil File No. 3-87-0802) (the "Alleco Action") now consolidated before this court. The court has considered papers filed and proceedings had herein, and otherwise is fully informed in the premises, and has determined that the Settlement set forth in the Settlement Agreement should be approved. The court hereby enters this judgment which constitutes a final adjudication of this matter on the merits.

Good cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This court has jurisdiction over the subject matter of this litigation and over all parties to this litigation, including all members of the Class. This Action is hereby consolidated with the Alleco Action.

2. The definitions of terms set forth in the Settlement Agreement and in the Order certifying the action as a non-opt-out class action and approving the form of notice (the "Notice Order") are hereby incorporated as though fully set forth in this judgment.

3. The court hereby approves the Settlement set forth in the Settlement Agreement and finds that said Settlement is, in all respects, fair, reasonable and adequate to the Class and within the authority of the parties. The court reaffirms its Order of May 21, 1991 certifying the Action as a class action for settlement purposes pursuant to Rules 23(a) and 23(b)(1) and (2) of the Federal Rules of Civil Procedure. The Class, as defined in the Settlement Agreement and used herein (the "Class"), means a class consisting of the named plaintiff and all other holders of the 9 1/2% Debentures as of the date of this order and hereafter.

4. Neither this Judgment, the Settlement Agreement, nor the Settlement is an admission by any party of the validity of any of the claims in this Class Action or any of the claims, counterclaims or appeals in the Alleco Action or of any wrongdoing by any of them or of any violation of law. Neither this Judgment, the Settlement Agreement nor the Settlement is a concession and none shall be used as an admission of any fault or omission by any party to either the Alleco Action or the Class Action or any other person in any statement, release or written document issued, filed or made. Neither this Judgment, the Settlement Agreement, the Settlement nor any related document shall be offered or received in evidence in any civil, criminal or administrative action or proceeding

other than such proceedings as may be necessary to consummate, enforce or demonstrate the occurrence of, this Judgment, the Settlement Agreement or the Settlement.

5. This court hereby dismisses this action on the merits and with prejudice against all persons and entities who are members of the Class[7] in favor of each and all of the defendants and without costs, except as agreed to by the parties. This court hereby dismisses the Alleco Action and all claims, counterclaims and appeals asserted therein with prejudice and without costs, except as agreed to by the parties. This court hereby vacates each of its prior orders in the Alleco Action including, without limitation, the order of August 16, 1989, the order of February 11, 1991, and the order of March 18, 1991.

6. All persons and entities who are members of the Class are, as of the Effective Date, hereby barred and permanently enjoined from prosecuting, commencing or continuing any and all causes of action, demands, rights, damages, liability, fees, costs or claims of any nature whatsoever, known or unknown, suspected or unsuspected and whether or not concealed or hidden, that have been, could have been or in the future might be asserted by any member of the Class against either of the defendants, Allegheny Beverage Corporation, LP Acquisition Corp., Lapides Corporation and their past, present and future officers, directors, employees, agents, attorneys, subsidiaries, affiliates, predecessors, successors and assigns, and the heirs, legal representatives and assigns

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[7] The judgment remains subject to the court's supplemental notice order of June 19, 1991.

of any of said persons, based in any manner upon the 9½% Debentures or the facts, transactions, events, occurrences, acts, misrepresentations or omissions alleged in, arising out of or in any way related to the allegations in the Class Action or the Alleco Action, or based on, related to or arising out of the subject matter of the Class Action or the Alleco Action including, without limitation, claims to unpaid interest on the 9½% Debentures. As of the Effective Date, Croyden Associates and all other Class members shall be conclusively deemed to have released and discharged the defendants of and from any and all such causes of action, demands, rights, damages, liability, fees, costs or claims, whether or not they have filed a Proof of Claim and Release form with the Exchange Agent; *provided* that this release and discharge of Alleco Inc., Allegheny Beverage Corporation, LP Acquisition Corp., Lapides Corporation and their successors and assigns (the "Alleco Releasees"), and the release of the Alleco Releasees made in connection with the delivery of the Proof of Claim and Release Form in the form of Exhibit C to the Settlement Agreement, and any release delivered in the form of Exhibits D, E, G, M and O to the Settlement Agreement shall be null and void to the extent any holder of 9½% Debentures who had surrendered such 9½% Debentures is compelled at any time to disgorge any portion of the case proceeds received from Alleco in the Settlement as a preferential transfer; *provided further* that any such holder who disgorges any such proceeds, while entitled to pursue in full any claim against the Alleco Releasees that existed prior to the Effective Date, shall hereby waive its right to recover on such claim from the Alleco Releasees in any subsequent

proceeding any amount exceeding the sum of (x) the amount of cash proceeds disgorged plus (y) interest on such amount form the date of disgorgement to the date such amount is recovered.

7. The court hereby declares that the 9½% Debentures and the Indenture shall be null and void and that the Trustee shall be discharged of any further obligations under the Indenture on the Effective Date and approves the plan of distribution of the Cash Settlement Fund and the New Securities set forth in Sections 4 and 5 of the Settlement Agreement. Holders of 9½% Debentures and the Trustee shall hereafter have no claims hereunder against any of the defendants jointly or individually, except claims under the Settlement or claims for recovery in the event of disgorgement of proceeds as described in the provisos of paragraph 6 hereof.

8. The Notice and Summary Notice given to the Settlement Class which set forth the principal terms of the Settlement and the other matters set forth therein, was the best notice practicable under the circumstances, including individual notice to all members of the Class who could be identified through reasonable efforts. Said notices provided due and adequate notice of these proceedings and of the matters set forth therein, including the Settlement set forth in the Settlement Agreement, to all persons entitled to such notice, and said notices fully satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure and the requirements of constitutional due process.

9. Without affecting the finality of this judgment in any way, this court hereby retains continuing jurisdiction

over: (a) implementation of this Settlement an [sic] any distributions to Class members pursuant to further orders of this court; (b) this action until this final judgment becomes effective and each and every act agreed to be performed by the parties has been performed pursuant to the Settlement Agreement and (c) all parties to this action for the purpose of enforcing and administering the Settlement Agreement.

10. In the event that the Settlement does not become effective in accordance with the terms of the Settlement Agreement, then this final judgment shall be rendered null and void and shall be vacated and, in such event, all orders entered in connection with the Class Action shall be null and void and all orders vacated pursuant to paragraph 5 hereof shall be reinstated *ab initio*.

11. It is expressly determined that there is no just reason for delay and the entry of this Judgment is hereby expressly directed by the court.

Dated: June 19, 1992.

/s/ Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Civil No. 3-91-323

AMENDED FINAL JUDGMENT AND ORDER OF DISMISSAL

Filed July 3, 1991

[Title Omitted In Printing]

THIS MATTER has come before the Court to determine whether there is any cause why this Court should not approve the proposed settlement (the "Settlement") set forth in the Settlement Agreement, dated as of May 24, 1991, as amended by the First Amendment to the Settlement Agreement dated as of July 1, 1991 (the "Settlement Agreement"), relating to the above-captioned action and the related action filed in this Court captioned *Alleco Inc., et al. v. IBJ Schroder Bank & Trust Company* (Civil File No. 3-87-0802) (the "Alleco Action") now consolidated before this court. The Court has considered papers filed and proceedings had herein, and otherwise is fully informed in the premises, and has determined that the Settlement set forth in the Settlement Agreement should be approved. The Court hereby enters this judgment which constitutes a final adjudication of this matter on the merits. Good cause appearing therefore, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties to this litigation,

including all members of the Class. This Action is hereby consolidated with the Alleco Action.

2. The definitions of terms set forth in the Settlement Agreement and in the Order certifying the action as a non-opt-out class action and approving the form of notice (the "Notice Order") are hereby incorporated as though fully set forth in this judgment.

3. The Court hereby approves the Settlement set forth in the Settlement Agreement and finds that said Settlement is, in all respects, fair, reasonable and adequate to the Class and within the authority of the parties. The Court reaffirms its Order of May 21, 1991 certifying the Action as a class action for settlement purposes pursuant to Rules 23(a) and 23(b)(1) and (2) of the Federal Rules of Civil Procedure. The Class, as defined in the Settlement Agreement and used herein (the "Class"), means a class consisting of the named plaintiff and all other holders of the 9½% Debentures as of the date of this order and hereafter.

4. Neither this Judgment, the Settlement Agreement, nor the Settlement is an admission by any party of the validity of any of the claims in this Class Action or any of the claims, counterclaims or appeals in the Alleco Action or of any wrongdoing by any of them or of any violation of law. Neither this Judgment, the Settlement Agreement nor the Settlement is a concession and none shall be used as an admission of any fault or omission by any party to either the Alleco Action or the Class Action or any other person in any statement, release or written document issued, filed or made. Neither this Judgment, the Settlement Agreement, the Settlement nor any related

document shall be offered or received in evidence in any civil, criminal or administrative action or proceeding other than such proceedings as may be necessary to consummate, enforce or demonstrate the occurrence of, this Judgment, the Settlement Agreement or the Settlement.

5. This Court hereby dismisses this action on the merits and with prejudice against all persons and entities who are members of the Class in favor of each and all of the defendants and without costs, except as agreed to by the parties. This Court hereby dismisses the Alleco Action and all claims, counterclaims and appeals asserted therein with prejudice and without costs, except as agreed to by the parties. This Court hereby vacates each of its prior orders in the Alleco Action including, without limitation, the order of August 16, 1989, the order of February 11, 1991, and the order of March 18, 1991.

6. All persons and entities who are members of the Class are, as of the Effective Date, hereby barred and permanently enjoined from prosecuting, commencing or continuing any and all causes of action, demands, rights, damages, liability, fees, costs or claims of any nature whatsoever, known or unknown, suspected or unsuspected and whether or not concealed or hidden, that have been, could have been or in the future might be asserted by any member of the Class against either of the defendants, Allegheny Beverage Corporation, LP Acquisition Corp., Lapides Corporation, General Electric Capital Corporation, the holders of the Senior Subordinated Discount Debentures due 1999 of Service America and their respective past, present and future officers, directors, employees, agents, attorneys, subsidiaries, affiliates, predecessors, successors and assigns, and the heirs, legal

representatives and assigns of any of said persons, based in any manner upon the 9½% Debentures or the facts, transactions, events, occurrences, acts, misrepresentations or omissions alleged in, arising out of or in any way related to the allegations in the Class Action or the Alleco Action, or based on, related to or arising out of the subject matter of the Class Action or the Alleco Action including, without limitation, claims to unpaid interest on the 9½% Debentures and claims that any transaction operated as a fraudulent conveyance with respect to the holders of the 9½% Debentures. As of the Effective Date, Croyden Associates and all other Class members shall be conclusively deemed to have released and discharged the defendants of and from any and all such causes of action, demands, rights, damages, liability, fees, costs or claims, whether or not they have filed a Proof of Claim and Release form with the Exchange Agent; *provided* that this release and discharge of Alleco Inc., Allegheny Beverage Corporation, LP Acquisition Corp., Lapides Corporation and their successors and assigns (the "Alleco Releasees"), and the release of the Alleco Releasees made in connection with the delivery of the Proof of Claim and Release Form in the form of Exhibit C to the Settlement Agreement, and any release delivered in the form of Exhibits D, E, G, M and O to the Settlement Agreement shall be null and void to the extent any holder of 9½% Debentures who has surrendered such 9½% Debentures is compelled at any time to disgorge any portion of the cash proceeds received from Alleco in the Settlement as a preferential transfer; *provided further* that any such holder who disgorges any such proceeds, while entitled to pursue in full any claim against the Alleco Releasees that existed prior

to the Effective Date, shall hereby waive its right to recover on such claim from the Alleco Releasees in any subsequent proceeding any amount exceeding the sum of (x) the amount of cash proceeds disgorged plus (y) interest on such amount from the date of disgorgement to the date such amount is recovered.

7. The Court hereby declares that the 9½% Debentures and the Indenture shall be null and void and that the Trustee shall be discharged of any further obligations under the Indenture on the Effective Date and approves the plan of distribution of the Cash Settlement Fund and the New Securities set forth in Sections 4 and 5 of the Settlement Agreement. Holders of 9½% Debentures and the Trustee shall hereafter have no claims thereunder against any of the defendants jointly or individually, except claims under the Settlement or claims for recovery in the event of disgorgement of proceeds as described in the provisos of paragraph 6 hereof.

8. The Notice and Summary Notice given to the Settlement Class which set forth the principal terms of the Settlement and the other matters set forth therein, in combination with the Supplemental Notice approved by the Court's June 19, 1991 Order and the Notice of the Proposed Amended Settlement and Amended Judgment approved by the Court's July ___, 1991 Order was the best notice practicable under the circumstances, including individual notice to all members of the Class who could be identified through reasonable efforts. Said notices provided due and adequate notice of these proceedings and of the matters set forth therein, including the Settlement set forth in the Settlement Agreement, to all persons entitled to such notice, and said notices fully satisfied the

requirements of Rule 23 of the Federal Rules of Civil Procedure and the requirements of constitutional due process.

9. Without affecting the finality of this judgment in any way, this Court hereby retains continuing jurisdiction over: (a) implementation of this Settlement and any distributions to Class members pursuant to further orders of this Court; (b) this action until this final judgment becomes effective and each and every act agreed to be performed by the parties has been performed pursuant to the Settlement Agreement; and (c) all parties to this action for the purpose of enforcing and administering the Settlement Agreement.

10. In the event that the Settlement does not become effective in accordance with the terms of the Settlement Agreement, then this final judgment shall be rendered null and void and shall be vacated and, in such event, all orders entered in connection with the Class Action shall be null and void and all orders vacated pursuant to paragraph S hereof shall be reinstated *ab initio*.

11. It is expressly determined that there is no just reason for delay and the entry of this Judgment is hereby expressly directed by the Court.

DATED this 3rd day of July, 1991.

/s/ Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Civil No. 4-91-368

NOTICE OF APPEARANCE AND OBJECTION
TO PROPOSED AMENDED JUDGMENT

Filed July 9, 1991

[Title Omitted in Printing]

PLEASE TAKE NOTICE THAT The Harry and Jeanette Weinberg Foundation Incorporated ("Foundation"), a Maryland corporation, is appearing for the purpose of objecting to the Proposed Amendment to the Settlement.

The Foundation's objections include, but are not limited to, the following:

* * *

4. The action is not maintainable as a class action pursuant to Fed.R.Civ.P. 23(b)(1) or 23(b)(2).